UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

KHAVKIN CLINIC, PLLC

and **28-CA-220023**
28-CA-223014

MICHAEL SCHNEIER, an Individual

Nathan A. Higley, Esq.,
for the General Counsel.

Christian Gabroy, Esq. and
Kaine Messer, Esq.
(Gabroy Law Offices),
for the Charging Party.

Jason D. Guinasso, Esq.
(Hutchison & Steffen, PLLC),
for the Respondent.

DECISION

STATEMENT OF THE CASE

JOHN T. GIANNOPOULOS, Administrative Law Judge. "As Robert Burns observed, the best-laid plans of mice and men often go awry." *United States v. Rand*, 482 F.3d 943, 945 (7th Cir. 2007). This case involves the sad conclusion to a story involving two friends who had discussed practicing medicine together for years. But the idea the two could work together making millions of dollars in a setting that was "just fun and easy and no stress," was a pipedream.[1] (Tr. 289). "Friendship and money: oil and water." *Soler v. Fernandez*, No. CV 3:11–1232, 2015 WL 5771929, at *1 (M.D. PA 2015) (internal quotation omitted).

The pair met when Dr. Yevgeniy Khavkin, M.D. (Khavkin) was a new neurosurgery resident at the University of New Mexico where Dr. Michael Schneier, M.D. (Schneier) was the attending neurosurgeon. The two became fast friends. Khavkin left New Mexico to continue his

[1] Transcript citations are denoted by "Tr." with the appropriate page number. Citations to the General Counsel and Respondent exhibits are denoted by "GC" and "R" respectively. Transcript and exhibit citations are intended as an aid only. Factual findings are based upon the entire record and may include parts of the record that are not specifically cited.

training in Chicago, before settling in Las Vegas, where he eventually opened his own clinic. Schneier moved on and eventually settled in the Los Angeles area. Despite working in different states, their friendship continued for 20 years. After discussing the prospects of working together on and off several times, in July 2016 Khavkin hired Schneier to work for him as a neurosurgeon at his clinic. Once they started working together, their friendship soon soured. Sixteen months after going to work at the Khavkin Clinic, PLLC (Respondent or Khavkin Clinic) Schneier was fired. (Tr. 63–63, 288–289, 293–294, 570; GC. 8). Lawsuits and litigation followed, including the unfair labor practice charges in this matter. The poet William Blake aptly noted, "[i]t is easier to forgive an enemy than to forgive a friend." William Blake, *Jerusalem* (1815) 'Chapter 4' (plate 91, l. 1).

Pursuant to a Complaint and Notice of Hearing (Complaint) alleging that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act), the hearing in this matter opened before Judge Dickie Montemayor on January 23, 2019. Respondent's counsel, who was not present at the hearing, had filed an emergency motion for a continuance and the hearing was recessed accordingly. No evidence was introduced into the record and there was no witness testimony taken. The hearing resumed before Judge Montemayor on May 7, 2019. The parties discussed subpoena issues and the hearing was again recessed. Once more, no evidence was introduced into the record and no witnesses testified. The hearing resumed on August 13, 2019. Judge Montemayor was unable to continue as the trial judge, and with the consent of the parties this case was tried before me in Las Vegas, Nevada, on August 13–15, 2019. In its Complaint the General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by discharging Schneier because he engaged in protected concerted activities with other employees for the purposes of mutual aid and protection. The Complaint also alleges that Respondent maintained a Confidentiality/Nondisclosure Agreement (Nondisclosure Agreement) with a provision that violated Section 8(a)(1) of the Act. Respondent denies the unfair labor practice allegations. (Tr. 5–6, 16–23, 30–31, GC. 1(e), 1(g)).

Based upon the entire record, including my observation of witness demeanor, and after considering the briefs filed by all the parties, I make the following findings of fact and conclusions of law.[2]

I. JURISDICTION

Respondent is a professional limited liability company located in Las Vegas, Nevada, that provides inpatient and outpatient medical care to individuals in the Las Vegas metropolitan area. Respondent also sublets space in Arizona, where Khavkin goes once a month to visit patients.[3] Respondent is owned by Khavkin, and employs over 20 employees, including Khavkin and two other neurosurgeons. During the 2017 calendar year, Respondent had annual revenues in excess of $5,500,000. In operating its medical clinic during 2017, Respondent purchased and received over $262,000 in medical supplies for use in the clinic. These medical supplies were primarily

[2] Testimony contrary to my findings has been specifically considered and discredited. Witness demeanor was the primary consideration used in making all credibility resolutions.

[3] In its brief, Respondent asserts that the revenues collected from Khavkin's monthly visits to Arizona are "approximately $12,000 a month." (Resp't. Br., at 16). Khavkin testified that he sees about 20 patients when he goes to Arizona, and only collects between $500–700 for the 1-day per month that he spends there. (Tr. 65).

purchased from McKesson,[4] a Delaware corporation, whose corporate headquarters is located in Irving, Texas.[5] During calendar year 2017, Respondent also paid $179,705 in insurance premiums, the majority of which was for malpractice insurance covering Respondent's healthcare providers. Over $70,000 in medical malpractice premiums to were paid to a Dallas based company called ProAssurance. (Tr. 36, 52–54, 61–65, 76–77, 92–93, 445–46; GC. 1(e), 1(g), 2, 21, 22).

Respondent vigorously contests the Board's jurisdiction in this matter, arguing that the Khavkin Clinic is local in nature, and does not substantially impact interstate commerce. (Resp't. Br., at 13). However, notwithstanding Respondent's claims, the Board clearly has jurisdiction. Respondent's annual gross revenues of over $5,500,000 exceed the $250,000 jurisdictional standards for health care facilities. *Jack L. Williams, DDS*, 219 NLRB 1045 (1974). Furthermore, Respondent purchased well over $50,000 in goods, materials, and insurance, from companies located outside of the State of Nevada, including a substantial sum paid to McKesson for medical supplies used in the clinic, and over $70,000 paid to ProAssurance for malpractice premiums. Based on the foregoing, I find that Respondent is a healthcare institution within the meaning of Section 2(14) of the Act, and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Id.; see also *Family Doctor Medical Group*, 226 NLRB 116 (1976); *Private Medical Group of New Rochelle*, 218 NLRB 1315 (1975).

II. RESPONDENT'S DEFENSES REGARDING THE UNDERLYING CHARGES

The Complaint in this matter is based upon two charges filed by Schneier. The first was filed on May 10, 2018, in Case 28–CA–220023, alleging that Schneier's discharge violated Section 8(a)(1) of the Act. Schneier filed the second charge, in Case 28–CA–223014, on June 29, 2018, alleging that Respondent's employee handbook contained overly broad and discriminatory language. Both charges were served upon Respondent on the same day they were filed. (GC. 1(b), 1(c), 1(d)).

Respondent asserts that the Complaint cannot be sustained based upon these charges. Regarding the charge in Case 28–CA–220023, Respondent claims the Complaint allegation involving Schneier's discharge is time barred, pursuant to Section 10(b) of the Act, because the General Counsel relies upon conduct that occurred outside of the 10(b) period to support its case in chief. (Resp't. Br., at 18–19). As for the charge in Case 28–CA–223014, Respondent asserts that, because Schneier was terminated on November 21, 2017, he was no longer an employee, was not "considered to be qualified as a charging party," and therefore could not allege that unlawful acts were committed by the clinic within the relevant 10(b) period. (Resp't Br. at 19). Respondent misses the mark on both claims.

[4] See https://www.sec.gov/ix?doc=/Archives/edgar/data/927653/000092765320000033/mck10k3312020.htm (last accessed on August 3, 2020). I take judicial notice of the McKesson Corporation 10(k), filed on March 31, 2020. See *Pacific Greyhound Lines*, 4 NLRB 520, 522 fn. 2 (1937) (Board takes judicial notice of facts stated in company's annual report filed with the Security and Exchange Commission); *Humphrey Hospitality Trust, Inc. Securities Litigation*, 219 F.Supp.2d 675, 684 (D.MD. 2002) (court may take judicial notice of 10-K filed with the SEC even though it was not attached to the Complaint); Fed. R. Evid. 201(b).

[5] According to McKesson's 10(k), the company relocated its corporate headquarters from San Francisco, California, to Irving, Texas, effective April 1, 2019.

Section 10(b) of the Act "establishes a six-month period for making charges of unfair labor practices." *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 169 (1983). As noted by the Supreme Court in *Local Lodge No. 1424 v. NLRB*, Section 10(b) "enacts a statute of limitations and not a rule of evidence. It forbids the issuance of complaints and, consequently, findings of violations of the statute in conduct not within the 6 months' period. But it does not . . . forbid the introduction of relevant evidence bearing on the issue as to whether a violation has occurred during the 6 months' period." 362 U.S. 411, 416, fn. 6 (1960) (quoting *Axelson Mfg. Co.*, 88 NLRB 761, 766 (1950)). Thus, "where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices . . . earlier events may be utilized to shed light on the true character of matters occurring within the limitations period." Id. It is only when the conduct "occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice," that the use of the earlier unfair labor practice is not merely "evidentiary" and a complaint based upon the earlier event is time barred. Id. at 417.

Here, regarding the charge in Case 28–CA–220023, Schneier's discharge occurred on November 21, 2017; therefore, the May 10, 2018 charge was filed within the 6-month limitation period. While the General Counsel relies on facts that occurred outside of the 10(b) period to support his case in chief, none of these facts have been charged as an earlier unfair labor practice. Instead, the facts are simply evidence used to reveal Respondent's motive for discharging Schneier. Accordingly, there is no merit to Respondent's 10(b) defense involving the charge in Case 28–CA–220023. *Textile Machine Works, Inc.*, 96 NLRB 1333, 1350–1351 (1951), enfd. 214 F.2d 929 (3d Cir. 1954) (evidence of union or concerted activity, respondent's knowledge of such activity, as well as proof of circumstances incident to the discharge, was relevant and admissible even though it related to events occurring more than 6 months before the filing of the charge); *Roadway Express*, 274 NLRB 357, 371 (1985) (appropriate to consider facts outside the 10(b) period as long as the discharge occurred within the 10(b) period).

As for the charge in Case 28–CA–223014, Respondent contends that the charge is defective as it was "filed on June 29, 2018, [and] is even *further* removed from the alleged actions of the Clinic." (Resp't Br. at 19) (italics in original). Respondent also asserts that the 10(b) period regarding this charge reaches only to December 29, 2017, and since Schneier was fired in November 2017, he cannot bring any relevant claims because he was no longer employed by the clinic and "cannot be considered to be a qualified charging party." Id.

Board law is clear, there is no 10(b) prohibition where a rule is being maintained within the 10(b) period, even though it may have been promulgated outside of the 10(b) period. *KMART Corp.*, 363 NLRB No. 66, slip op. at 10, fn. 11 (2015) (collecting cases and noting that maintenance of a rule within the 10(b) period renders the action timely). Here, the Complaint alleges that "[s]ince about November 10, 2017, Respondent has maintained" the Nondisclosure Agreement in its employee handbook, and Respondent admitted in its Answer "that at all material times stated in the Complaint" it has done so. (GC. 1(g), GC. 1(e)).[6] A party's admission in an answer "constitutes a binding judicial admission." *Crest Hill Land Dev., LLC v.*

[6] Respondent stipulated that it provides the handbook to employees, and that the provisions in the handbook apply to its non-physician employees. (Tr. 87–88).

City of Joliet, 396 F.3d 801, 805 (7th Cir. 2005); *Boydston Electric Inc.*, 331 NLRB 1450, 1451 (2000) (admission in answer is binding and conclusive); *Liberty Natural Products*, 314 NLRB 630 (1994), enfd. mem. 73 F.3d 369 (9th Cir. 1995), cert. denied 518 U.S. 1007 (1996) (where answer admits complaint allegation that individual is a supervisor, General Counsel can rely on admission and does not need to litigate that issue). Therefore, the General Counsel did not need to litigate the question of whether the Nondisclosure Agreement was maintained within the 10(b) period, as Respondent admitted in its answer that it had maintained the provision at all material times since about November 10, 2017. *United Steelworkers Local 14534 v. NLRB*, 983 F.2d 240, 247 (D.C. Cir. 1993) (where employer's answer admitted complaint allegation that striking employees, through the Union, made a written unconditional offer to return to work, employer took that issue out of the case).

Respondent's next assertion, that the charge is faulty because Schneier was not employed by the clinic when the charge was filed, is similarly meritless. As the Board recently noted in an order denying a respondent's motion to dismiss "any person may file an initial charge." *FDRLST Media, LLC*, 02–CA–243109, 2020 WL 1182438 (unpublished order); see also *NLRB v. Ind. & Mich. Elec. Co.*, 318 U.S. 9, 17–18 (1943) (a "stranger" to the relationship may file the initial charge; noting Senator Wagner's objection to limiting who could file); *Castle Hill Health Care Center*, 355 NLRB 1156, 1190 (2010) (anyone may file a charge with the NLRB). See also Section 102.9 of the Board's Rules and Regulations ("Any person may file a charge alleging that any person has engaged in or is engaging in any unfair labor practice affecting commerce."). Accordingly, the charge in Case 28–CA–223014 is properly filed.

III. SCHNEIER'S DISCHARGE

A. Facts

After finishing his residency and fellowship, Khavkin became the chief of surgical spine services at Northwestern University. Then, in 2010 he then moved to Las Vegas and started working for an orthopedic spine surgeon named Jaswinder Grover (Grover). Khavkin worked with Grover for about 3 years before starting the Khavkin Clinic in 2013. The Khavkin Clinic specializes in both spine and brain surgery, employing 3 neurosurgeons and about 20 non-physician employees, including physician assistants, medical assistants, a scheduler/surgical coordinator, and an office manager.[7] Larry Linton (Linton) served as Respondent's chief executive officer, in charge of branding and business strategy. Linton is Khavkin's brother-in-law and reported directly to Khavkin who oversaw the entire operation. (Tr. 62–63, 92–93, 84, 113, 123, 138, 153, 167, 240, 271–272, 450, 457).

While he was still working for Grover, Khavkin formulated plans to start his own clinic. He reached out to Schneier, who was working in California but having some difficulties, to join him. Khavkin and Schneier had known each other for 20 years and were friends. Khavkin thought Schneier had integrity, was a good physician, and would fit into his new clinic which he wanted to run with the philosophy of collegiality and professionalism. Khavkin believed that

[7] Respondent also provides pain management, ear, nose & throat, and facial plastics services to patients, employing additional physicians who work in these specialties. (Tr. 71, 74–75, 163, 233, 280).

Schneier would flourish and his goal was to create an environment where Schneier could do so. (Tr. 127, 175–176, 574; GC. 19).

1. Schneier moves to Las Vegas

Schneier testified he was living in California when Khavkin contacted him about moving to Las Vegas. The pair had kept touch over the years and discussed the possibility of working together many times. In fact, Schneier said he once had Khavkin come to California to look into joining a practice group there. Schneier testified that Khavkin told him they would be a tier above anyone else in Las Vegas. Khavkin further said he did not want to make any money off of Schneier, that it would be fun, easy, no stress, and Schneier would make a million dollars. According to Schneier, basically "that was the plan coming in, and I came for it." (Tr. 289).

Khavkin testified that he liked Schneier, thought he was a good guy, with a good heart, and knew he was having problems in California. Khavkin believed Schneier meant well but was misunderstood by others over the course of his career; that is why Khavkin brought him to Las Vegas. Khavkin further testified that, while still working for Grover, he helped negotiate a 9-month contract for Schneier to come to Las Vegas and work at Centennial Hills Hospital, with the intention of opening the Khavkin Clinic and then hiring Schneier. Khavkin said that, because of his problems in California, Schneier was having difficulties getting privileges in Las Vegas until Khavkin stepped in to help. According to Khavkin, because he was the chief of surgery and neurosurgery at multiple hospitals in the area, he was able to help Schneier eventually gain hospital privileges in Las Vegas. (Tr. 154, 175–176, 228).

The complete nature of Schneier's problems in California are unclear, but the record shows that in September 2013 the CEO of a California hospital filed an Adverse Action Report with the United States Department of Health and Human Services (HHS) alleging that Schneier voluntarily surrendered his clinical privileges at the hospital while he was under, or in order to avoid, investigation relating to his professional competence or conduct. On February 16, 2016, HHS issued a letter voiding Adverse Action Report, saying it should not have been filed and that it was removed from the agency's National Practitioner Data Bank. (Tr. 369–370; GC. 19).

Schneier testified that he originally moved to Las Vegas on a financial recruitment package from Centennial Hills hospital; the exact date Schneier came to Las Vegas is unclear from the record. Schneier said his ability to apply for hospital privileges in Las Vegas was constrained because of the HHS Adverse Action Report, but that he was able to get hospital privileges at the University Medical Center. According to Schneier, during this period he focused more on exonerating himself, regarding the Adverse Action Report, instead of expanding his practice. In July 2016, about 5 months after receiving the HHS letter voiding the Adverse Action Report, Schneier started working at the Khavkin Clinic. (Tr. 177, 290, 293, 406–407; GC. 19).

2. Schneier starts working at the Khavkin Clinic

According to Schneier, he and Khavkin met at a Starbucks and reached a handshake deal regarding his employment with Respondent. Schneier said that Khavkin had originally offered

him a salary of about $30,000 per month, with an incentive allowing Schneier to keep whatever income he generated over this base amount. However, Schneier wanted more money up front, because of what he said had been "a fallow year before." (Tr. 291). Schneier said he requested a base of $40,000 with a signing bonus and front payments. Schneier testified the pair eventually agreed on an arrangement where Schneier would receive a guaranteed base salary of $40,000 per month, along with additional frontloaded payments. (Tr. 291, 393–397).

Schneier testified that the agreement was never reduced to writing. And, he said that during their discussions, Khavkin stated the two of them would conquer the world, grow together, and take over the town by providing complex hospital services allowing them to take more and more on-call coverage and build a practice group around the two of them. In reply, Schneier said he told Khavkin that they should build something meaningful, because Las Vegas needed a center of excellence, and in the long run it would benefit Khavkin who would have it all after Schneier retired. (Tr. 291, 394, 405)

According to Khavkin, the terms of Schneier's employment was set forth in a written agreement that both he and Schneier signed, calling for Schneier to be paid a flat salary of $40,000 per month. Khavkin claimed that Schneier's written employment contract was the result of negotiations between the two of them, with the help of an attorney he hired named Maria Nutile (Nutile). Khavkin testified that he hired Nutile originally to help extract Schneier from his previous employer, and afterwards she drafted Schneier's employment contract once Khavkin and Schneier had agreed upon the terms. Khavkin said that both he and Schneier signed the agreement and they each had a copy of the signed document which Khavkin kept in the office manager's office. (Tr. 113–114, 211–212, 251–252; R. 1).

After Schneier was fired, Khavkin claimed that he could not find his signed copy of Schneier's employment agreement. Instead, at trial Respondent introduced into evidence an unsigned version of the agreement that Khavkin said was the document they both signed. Respondent called as a witness Tonya Gottesman (Gottesman), who was the office manager at the time Schneier was hired. Gottesman testified that she witnessed both Khavkin and Schneier sign an employment agreement, and that she took the signed agreement and put it in a file. As for the document introduced into evidence by Respondent, Gottesman testified that she had no reason to believe it was any different than the one she saw Khavkin and Schneier sign. That said, Gottesman did not identify the unsigned contract as the actual document she witnessed the parties sign, nor did she testify that she read through the agreement before it was signed. Instead, it appears that, other than putting the signed contract in a file, she never possessed the document long enough to read it, as Gottesman testified the agreement was sent directly from Nutile to Khavkin for signature.[8] (Tr. 211–215, 544–551).

For his part, Schneier denied that he ever signed the employment agreement, and further said that Respondent never asked him to sign it. Notwithstanding, Schneier admitted having seen the document, saying it was given to him and he reviewed it, but that he never signed it. (Tr. 380, 399).

[8] During her testimony, Gottesman also authenticated a June 10, 2017, email she sent Khavkin saying that Schneier's signed contract was in the office manager's office. However, Gottesman was no longer working for Respondent at the time she sent the email. (Tr. 543–544, 553; R. 6).

3. Loan/Frontloaded payments to Schneier

a. Background

Separate from his $40,000 monthly salary, Schneier received a series of cash payments from Respondent. Khavkin testified that, starting in 2016, he loaned Schneier a total of $167,000 that was paid over several installments, but Schneier refused to repay money or sign a repayment agreement.[9] According to Khavkin, Schneier used this money for the mortgage on his California house and to pay his daughter's tuition. There was no documentation involving these lump-sum cash payments. Khavkin considered the payments as loans that he made to Schneier because of their friendship. He had every expectation that Schneier would pay the money back, just as Schneier had repaid a previous loan for $100,000 that Khavkin made to him when Schneier first moved to Las Vegas. (Tr. 176, 178, 228, 245–248).

Khavkin testified that, at Schneier's request, some of the 2016 loan proceeds were processed as salary payments, and appeared on Schneier's W-2, because Schneir needed to show that he was getting paid more than he was actually receiving. Khavkin said that, pursuant to their verbal agreement, Schneier was supposed to start paying the loan back on January 1, 2017. However, he said that Gottesman approached Schneier several times with a payment schedule and Schneier refused to repay the money. According to Khavkin, since January 2017, the loan was an issue of ongoing friction between the two as Schneier would not make any payments on the obligation. (Tr. 246–248).

Schneier acknowledged that he received a sum of money from Respondent, over and above his $40,000 monthly base salary. However, rather than referring to this money as a loan, Schneier described it as frontloaded pay. Schneier testified that these up-front payments were agreed to as part of his handshake deal with Khavkin, and Schneier was supposed to repay the money based on the income he generated for the clinic that exceeded his $40,000 monthly salary. However, according to Schneier, if he was not given a fair opportunity to be as productive as his skill set would allow, he could keep the money without paying it back; Schneier said "[t]hat was the guarantee." (Tr. 291–93, 396–97, 404–405).

Regarding the payments themselves, Schneier testified that, while there was no limit to the amount of money that could be frontloaded, Gottesman helped broker the disbursements from Respondent to make it appear as if Schneier's annual income was $600,000. Gottesman testified she issued the first loan/frontload payment check to Schneier shortly after he started working at the clinic. According to Gottesman, Schneier told her he was having issues buying his house, and Gottesman testified that she was speaking directly with Schneier's mortgage broker about the money. (Tr. 246, 398, 558–559, 246).

Emails were introduced between Gotteslman and Schneier's wife discussing these payments. In their email exchange, which occurred on March 2, 2017, Schneier's wife

[9] The parties also disputed who was responsible for paying Schneier's malpractice insurance. Khavkin testified that Respondent paid a total of $80,000 for Schneier's malpractice insurance because he did not have money to cover these costs. Schneier testified that Respondent was responsible for paying the insurance. (Tr. 228, 245, 332).

acknowledges that Schneier received checks from Respondent for $50,000, $36,000, and $20,000, along with an extra payroll allotment of $32,000. In addition, Schneir's wife wrote that some of Schneier's paychecks were also enhanced. In one email, Gottesman attached a proposed payment schedule based upon a loan amount of $167,090 to be repaid over a year, with bi-weekly payments of $6,592.70, and a 5 percent annual interest rate. In reply, Schneier's wife asked for an accounting of how the total dollar amount was calculated and expressed concern about paying taxes on money that she and Schneier would be paying back to Respondent. Gottesman agreed with her concerns about the tax issue. (Tr. 402–403; R. 4).

b. Promissory Notes

On several occasions, Respondent presented Schneier with, and asked him to sign, a promissory note regarding the loan. One of the promissory notes that Schneier was asked to sign was introduced into evidence. The document is dated May 8, 2017 and is for a principal sum of $153,437.85. It calls for Schneier to repay the principal and interest starting on June 8, 2017, in biweekly installments through payroll deductions, with a 5 percent annual interest rate on the unpaid balance. (Tr. 400–401, 454–455, 462–464; R. 3).

Schneier refused to sign the promissory notes presented to him by Respondent, and he denied that the money was a loan. He viewed the payment terms proposed by Respondent as predatory, and complained that he never received a specific accounting, but instead was just given a total amount due. Regarding the payment terms, Schneier testified that Respondent "basically wanted to financially cripple me and then fire me." (Tr. 320) In early 2018, Khavkin filed a lawsuit against Schneier for the outstanding money. After the lawsuit was filed, Schneier filed the charge in this matter regarding his termination. (Tr. 320–321, 401–402, 413–414).

4. Respondent's neurosurgeons

a. Background

During the relevant time period, Respondent employed three neurosurgeons: Khavkin, Schneier, and Dr. Ippei Takagi, M.D. (Takagi). Takagi started working for Respondent in 2015. Before joining the Khavkin Clinic he worked as a physician in Arkansas for a year, having just completed his residency. Unlike Schneier, Takagi was paid a base salary along with a bonus depending upon his productivity. (Tr. 114, 505–506).

Patients came to the Khavkin Clinic primarily through referrals, either from other physicians or former satisfied patients. Khavkin, Takagi, and Schneier each had their own patient referral sources, with certain doctors referring patients to Khavkin, others referring them to Takagi, and still others to Schneier. According to Khavkin, after he was hired, Schneier specifically expressed an interest in performing cranial surgeries, which was his area of expertise, whereas Khavkin and Takagi primarily specialized in spine surgeries. Therefore, Khavkin said that he had an agreement with Schneier that if a complex cranial case came into the clinic, that patient would be referred to Schneier. However, Khavkin testified that Schneier ultimately became unhappy about this arrangement and would refuse to take certain patients. For his part, Schneier denied that he was the cranial specialist at the clinic, noting that he

completed a spine fellowship and was on the advisory board for a professional spine journal. Notwithstanding, he admitted that the other doctors sought him out for help with issues involving the head and brain. (Tr. 95–97, 225, 376–377, 492).

Respondent's neurosurgeons examined their patients at the Khavkin Clinic and performed surgeries at area hospitals. The time they spent examining patients in the office was referred to as having "clinic days." Each physician had different clinic days, with Schneier usually examining patients once a week on Wednesday; Tuesdays and Thursdays were reserved for Khavkin. Hospital surgeries were scheduled through the office's surgical coordinator who would make all the necessary arrangements for the surgeries. The scheduler was also responsible for adding patients to the physicians' clinic days based upon referrals. (Tr. 93–97, 113, 153, 325, 330, 346).

b. Hospital call coverage

As part of their job duties, Respondent's physicians also provided "call coverage" for area hospitals; this was also referred to as working "on-call," or "taking call." In this capacity Respondent's neurosurgeons were contracted to provide neurosurgical care to patients at specific hospitals as needed. If a patient came into the hospital's emergency room with a neurological issue, the hospital contacted the on-call physician who would come to the hospital, evaluate the patient, give their opinion as to whether surgery was required, and perform the procedure if necessary. (Tr. 95, 108, 237, 491–492).

Respondent's on-call work at area hospitals ultimately became a point of contention for Schneier. Pursuant to the unsigned employment contract, Schneier was obligated to provide call coverage as needed, but whatever money Respondent collected for working on-call, including the related surgeries, remained with the Khavkin Clinic. Schneier did not receive any extra money for providing on-call services. For his part, Schneier insisted that providing call coverage was not part of the agreement he reached with Khavkin. And, Schneier wanted to receive some of the money that Respondent collected when he was performing on-call work. Schneier testified that a neurosurgeon can easily make more than $40,000 per month by just providing call coverage. (Tr. 327–28, 396; R. 1)

Schneier also believed that, because of his expertise, he ended up always being Respondent's on-call physician whenever a complex brain tumor or similar issue arose, even when he was not specifically assigned to work on-call. Schneier thought Takagi was dumping patients on him whenever Takagi was working on-call and had a difficult case. According to Schneier, when Takagi was providing call coverage, and was not confident in his ability to handle a specific matter, Takagi would refer the patient to Schneier saying he was morally responsible to take care of the patient. This frustrated Schneier, who felt he was getting no help or support from Respondent. Instead, Schneier believed that Respondent was transferring to him very complex cases, with a high potential liability if something went wrong, but he was not receiving any extra money for this work. Instead, Schneier believed that Takagi was receiving the on-call money. (Tr. 327–328, 358–363, 380–381).

Schneier testified that, at one point, he went to Nutile and asked her to "please make this work," regarding his employment with Respondent. During this conversation, Schneier said he told Nutile that Respondent had no legal right to keep the call money and that he had not received an accounting from Respondent regarding the proposed promissory note. Schneier also said that he discussed with Nutile the work environment at the clinic and told her that Khavkin could not withhold his paychecks. He asked Nutile if she could find a way to mediate the matter so he and Khavkin could come to an understanding. During this discussion, Schneier made an offer that Respondent pay him based on the total revenues he collected, less between 30–40 percent for overhead costs, plus the call coverage money would be paid directly to the surgeon on-call, instead of to the Respondent.[10] Schneier said that his offer was based upon contract offers he received from other practice groups before he decided to join the Khavkin Clinic. Schneier testified that he had similar conversations about changing his employment terms multiple times with multiple people, including Linton and Khavkin. However, Respondent would only offer to renegotiate Schneier's employment based upon a 90 percent overhead cost, without giving Schneier the ability to hire staff or contain costs. (Tr. 324–327, 391).

c. Respondent's billing for surgeries

Each neurosurgeon at the Khavkin Clinic was responsible for submitting information for the surgeries they performed to the billing department in a timely manner. Billing was a priority for Respondent as revenues from insurance company payments were based upon billed surgeries. It usually took a couple of months after bills were submitted to the insurance companies for the payments to be processed. (Tr. 119, 143, 232, 237)

Respondent did not have a set method for reporting surgeries to the billing department. Instead, each surgeon used a different procedure. After every surgery, Takagi would take the "face-sheet" containing the relevant information about his surgery and bring it to the billing department. Then, he would review his surgery logs, look at his reimbursements, or talk to the billing department, to ensure his billings were correctly processed. On his clinic days, Schneier provided the billing office with paperwork containing the patient's insurance information and the work he performed. As for Khavkin, he kept a book with the relevant information and put stickers in it signifying his surgeries. Twice a week his biller would copy the information in this book. (Tr. 119, 330, 345, 490–491).

Sometimes emergency surgeries performed by a physician who was working hospital call coverage would get missed for billing purposes. These surgeries were not prescheduled, and therefore not in Respondent's records. Accordingly, unless the on-call physician notified the billing department directly, nobody at the clinic would ever know that the surgery occurred, and Respondent would not get paid. (Tr. 237).

[10] Some medical groups base a physician's pay on a formula using collected fees less a fixed percentage for overhead costs. See e.g., *Reichman v. S. Ear, Nose & Throat Surgeons, P.C.*, 598 S.E.2d 12, 14–17 (2004) (trial court properly dismissed doctor's claim that medical group misrepresented the collection rate and overhead factor of 60.5 percent to induce the physician to enter into contract with practice group).

5. Khavkin's friendship with Schneier sours

Khavkin testified that his relationship with Schneier started to sour in early 2017 when he realized Schneier was refusing to acknowledge that he owed any money to Khavkin pursuant to the loans he received from Respondent. Khavkin felt that he had been trying to help Schneier the entire time he was in Las Vegas, but that Schneier refused to acknowledge the help, and further refused to take any responsibility for reimbursing Khavkin for the loans. Respondent had attempted to get Schneier to repay the funds multiple times, and Khavkin's frustration over Schneier's lack of responsiveness accumulated. It was at this point Khavkin said their relationship, as a friendship, deteriorated. (Tr. 157, 570).

Along with loaning him money, Khavkin testified that he continuously tried to help Schneier grow his practice and generate revenues that exceeded the expenses associated with bringing him into the practice group. Khavkin said that, because Schneier complained he did not have any help, Respondent hired a specific physician's assistant (PA), at a cost of $225,000, per Schneier's request. Khavkin testified that he also sent Schneier referrals, particularly cranial cases, to provide him with extra work; but many times Schneier refused to take these referrals. Khavkin also said that none of the efforts he made to increase Schneier's productivity helped. Instead, Khavkin claimed his decision to bring Schneier into the practice resulted in Respondent consistently losing money on Schneier for almost a year and a half, and that he had multiple conversations with Schneier about this issue. According to Khavkin, at no point during his employment did Schneier get anywhere close to generating $40,000 in monthly collections. Instead, Khavkin said that throughout his employment, Schneier's collections were always much lower than what he was being paid. (Tr. 108, 127, 136–139, 150–152, 229, 250, 571).

According to Schneier, he was not getting any help from Respondent, particularly during surgeries, and he denied that the new PA was hired to assist him. Schneier said that whatever surgical help he received from the PA would only be for a "touch and go," to create a billable moment, and then the PA would leave, which was of no real help. (Tr. 359). And, regarding the cases Respondent's other physicians were referring to him, particularly the cranial cases, Schneier believed they were dumping these cases on him. Indeed, he thought that Respondent was constraining his ability to build a practice, not helping him. (Tr. 358–359, 363, 377–381).

Regarding Schneier's collections, billing records for both Khavkin and Schneier were introduced into evidence for the period of May 1, 2017 to November 25, 2017. The records show that, during these 7-months, Khavkin billed just over $10,700,000, and collected $774,176. Schneier billed a little over $6,500,000 and collected $588,701. At $40,000 per month, Schneier's salary for this 7-month period would have been $280,000, so he clearly collected enough money to cover his salary. However, it is unclear if his collections were sufficient to cover both his salary and his share of the practice's expenses, as no evidence was presented as to how Respondent allocated those expenses amongst its various physicians. (GC. 12, 13).

6. Schneier's relationship with other physicians.

Khavkin testified that people were telling him Schneier was badmouthing other physicians in the community. Khavkin identified three specific physicians who contacted him

directly and "reported extremely negative interaction[s]" with Schneier. (Tr. 158) One of those physicians was Grover; Khavkin and Grover were still friends. According to Khavkin, Grover told him that Schneier made undesirable comments about Grover's professionalism, competency, and ability to care for patients, including during testimony involving a personal injury matter. Khavkin said another area physician asked him, regarding Schneier, "who the fuck is this guy who is working for you who is badmouthing me to everyone and telling everybody I don't know what the fuck I am doing?" (Tr. 171). A third physician allegedly called Khavkin and said that Schneier essentially told him to "fuck off," and was very rude when the physician asked Schneier for help with a procedure. This physician had been a colleague of Khavkin's for many years. (Tr. 158, 166–167, 171–172).

Khavkin also testified that the surgical coordinator at a certain hospital told him Schneier was badmouthing other physicians who worked out of the same hospital. According to Khavkin, this person said Schneier was also telling people that Khavkin was incompetent and should not be practicing medicine. Moreover, Khavkin testified that Respondent's employees told him that Schneier made similar comments, including badmouthing Takagi, in the office in front of the clinic's other employees. Regarding Takagi, it was reported to Khavkin that Schneier said Takagi was lazy, and continuously dumped cases on him. Khavkin said these types of comments became an ongoing issue from about August or September 2017 onward. (Tr. 158–164).

Khavkin testified that whenever an incident like this happened, he would call Schneier and tell him that he cannot speak to or about people this way; Schneir would just acknowledge the comments. According to Khavkin, Schneier has been this way for 20 years, ever since they first met. (Tr. 173–175).

For his part, Schneier denied that he badmouthed other physicians. Regarding Grover, Schneier said they were on opposite sides in a litigation where Grover was the plaintiff's surgeon, and Schneier was an expert witness retained by the defense. In the litigation, Schneier provided an opinion that differed from Grover's. (Tr. 353–354, 366, 368).

As for the hospital surgical coordinator who reported certain of Schneier's alleged statements to Khavkin, Schneier testified the two of them had a contentious relationship, and the coordinator had reported Schneier to the hospital for a patient care issue. However, Schneier said that he was able to prove to the hospital's CEO that the issue was caused by the hospital's broken equipment and unhelpful staff, both of which were eventually upgraded. (Tr. 357).

Regarding Takagi, he testified Schneier was not a team player and did not like covering Takagi's hospital calls when asked. Takagi said that he initially tried working with Schneier, and would ask nicely for assistance when needed, but he would just get pushback instead. Takagi said Schneier's responses were usually short and curt. He also said that Schneier did not view him as an equal, but instead thought Takagi was a less skillful surgeon. According to Takagi, Schneier was not someone he really wanted to continue working with. That being said, text messages between Takagi and Schneir were introduced into evidence showing that Takagi continued seeking assistance from Schneier in February, July, and October 2017. In one of the texts, Takagi asks if Schneier could see three patients at a certain hospital, and said he was sorry to "dump" the patients on Schneier. (Tr. 484–485, 494–495, 501–502; GC. 17).

Takagi also testified that Schneier regularly made negative comments about the competency of other local physicians, including two of the physicians that had complained to Khavkin. And, Takagi said Schneier had called both Takagi and Khavkin incompetent and told Takagi specifically that he was not a good surgeon. However, Takagi never reported these incidents to Khavkin. (Tr. 488–489, 498–500).

Gottesman testified she witnessed Schneier complain about Takagi, and that on several occasions he said Takagi was incompetent. Gottesman also testified that Schneier complained about Khavkin, the way Khavkin ran his clinic, and how he treated the office staff and hospital workers. Finally, Gottesman said that she heard Schneier complain about other doctors in the area, saying a certain doctor was crazy and another did not know what he was doing. According to Gottesman, she mentioned these incidents to Khavkin. But Gottesman also said that Khavkin and the rest of the staff witnessed these comments first-hand. (Tr. 554–557)

7. Schneier's complaints about working conditions

Schneier testified that during his employment he started having concerns about Khavkin's behavior, as he did not think Khavkin was treating the staff appropriately. Schneier believed Khavkin was dismissive to the office staff, that he was berating and demeaning them publicly, and would needlessly fire them. According to Schneir, Khavkin directed his rage at the staff for minor or petty incidents and created an environment where they were not being allowed to succeed. Schneier said office staff employees complained to him saying they did not know what to do as Khavkin was demeaning them for whatever they did. Moreover, Schneier testified the staff believed they were being put in an impossible situation, as Khavkin would disappear for hours and they had no recourse to deal with the angry patients who were left waiting. According to Schneier, he tried talking to Khavkin "[i]n a sort of because-I-cared manner" on how to deal with people. However, he said Khavkin felt that the staff was disposable and ended the dialogue with Schneier. (Tr. 295–297).

Regarding specific employees, Schneier said he had several conversations with Khavkin in October and November 2016 about an employee named Jack Senseney (Senseney), who was the office manager at the time.[11] Schneier claimed that Senseney was being publicly demeaned, and when he spoke to Khavkin about it he was told that Senseney was too effeminate, acted like a girl, and behaved like a girlfriend to the office staff. In this same conversation Schneier said that Khavkin told him he could not have Senseney being "one of the girls" because he wanted people to fear working for him and therefore fear Senseney as the office manager. (Tr. 298). In reply, Schneier told Khavkin he was supportive of Senseney's role with the office staff, and that the office was working more smoothly under his direction. However, Schneier said that Senseney was eventually demoted and then fired. (Tr. 297–298, 301–303).

[11] In the Complaint, the General Counsel alleges that Senseney's job title was "Manager," that he was a supervisor within the meaning of Section 2(11) of the Act, and Respondent's agent within the meaning of Section 2(13) of the Act. (GC. 1(e)). Respondent's Answer admits that Senseney served as a "Manager of the facility," but denied the General Counsel's other allegations. (GC. 1(g)).

Schneier also testified that several members of the office staff spoke to him about their concerns regarding turnover in about November or December 2016. He said the staff came to him because they assumed he was "affable" and had a relationship with Khavkin. (Tr. 304). According to Schneier, the office staff feared they would be fired because they saw so many people leaving. When the General Counsel asked Schneier which specific employees brought these concerns about turnover to him, Schneier testified that Senseney had some concerns, that he had his own concerns, and at some point everybody had concerns about their job status. According to Schneier, staff turnover was important because it reflected poorly on the clinic and diminished its legacy. Also, he said it affected patient referrals, as former employees would get jobs with other physicians/practice groups which would not be receptive to referring patients to Respondent after learning about all the staff turnover. Schneier testified that he shared these concerns about turnover with Khavkin in about November or December 2016, but Khavkin was dismissive, saying that the staff was disposable, and it did not matter because patients were going to want to come to the Khavkin Clinic. (Tr. 305–306).

Schneier also testified that people came to him about concerns regarding their paychecks being withheld, which he said was Respondent's "nom de guerre" and that these complaints became more frequent in 2017. (Tr. 307) When asked for specifics, Schneier said that an employee named Johany felt her job was in jeopardy, was looking for a new job, and was concerned her last paycheck would be withheld if she lost her job. He claimed that when Johany was fired her last paycheck was withheld, and further stated that another employee came with a police officer to obtain her last paycheck. Schneier claimed that he raised this issue with Khavkin, but when he was asked for details about this conversation, Schneier instead discussed an April 2017 conversation with Nutile, where he spoke with her about one of his paychecks being withheld and asked for legal advice involving a purported "kickback scheme." (Tr. 308) According to Schneier, Nutile told him to stay away from the kickback arrangement, and to seek legal counsel regarding his paycheck.[12] (Tr. 307–308, 327).

According to Schneier, in about February or March of 2017 he spoke to Khavkin about his rage, and the fact he was coming to work late, which was causing difficulty for the office staff. Schneier testified that Khavkin's rage was becoming difficult to manage as employees were afraid to present issues to him or felt they would be demeaned for inconsequential reasons; Schneier said Khavkin would scream at staff in front of their coworkers. As with employee turnover, Schneier believed this behavior diminished the quality/legacy of the clinic, as employees would discuss Khavkin's behavior when they moved on to other employment. According to Schneier, Khavkin responded to his concerns by saying that it was "about the Khavkin Clinic," the patients were there to see him, and the staff's role was to facilitate this; if the staff could not do so, Khavkin would get someone else who could. (Tr. 310–311).

In about June 2017, Schneier said that Carla Argueta (Argueta) came to him complaining about Khavkin's behavior. Schneier knew Argueta before he started working for Respondent, he recruited her to work at the clinic, and at the time of the hearing Argueta was employed by Schneier. Schneier testified that Argueta expressed multiple concerns to him including about being berated for working late, having to fight to get paid, staffing issues, and an incident involving Khavkin going through her phone to read her personal text messages. Schneier said

[12] Schneier said that he also spoke to Nutile about selling a patent during this conversation. (Tr. 308).

that he went to Khavkin to discuss these matters "trying to contain him as sort of a mentor." (Tr. 315). However, according to Schneier, Khavkin was dismissive, saying everything was about the Khavkin Clinic, that he could do what he wanted and dismiss anybody whenever he wanted. Schneier testified that he also brought these concerns to Linton sometime during the summer of 2017, saying that during this time period Linton "came to me with proposals," and "at that point I kind of discussed the issues with him." (Tr. 317). However, it is unclear exactly what proposals Linton presented to Schneier, or what specifics issues Schneier discussed with Linton. (Tr. 312–317).

At the end of his testimony, Schneier said that he had omitted even more instances where other employees complained to him about working conditions, but he could not recall the names of these other employees. Schneier then set forth a laundry list of topics these employees allegedly discussed with him, primarily involving staff issues related to patient care, but provided no specifics regarding when or where these discussions occurred. (Tr. 411–416).

Argueta testified at the hearing and said Khavkin would get angry at the office staff over things they could not control, like scheduling surgeries or last-minute changes. According to Argueta, Khavkin would get angry with her about once a week; she also testified that most of the staff was also subjected to his wrath. Argueta, who started working for Respondent in September 2016, said that she started becoming concerned about Khavkin's behavior 6 months into her employment. Argueta discussed her concerns with others at work and also expressed her concerns to Schneier multiple times.[13] Argueta said that she felt comfortable discussing her concerns with Schneier, who told her that he "would bring it up," but never told her with whom he would discuss the matter. (Tr. 434) Argueta said that she also witnessed a coworker named Catrice discuss with Schneier concerns about the stressful office environment. (Tr. 426–436).

Khavkin admitted that he had a demanding management style and expected a lot from his employees. Khavkin testified that he is very structured and particular at work. He wants things done in a specific way regarding patient care and has little tolerance for deviations; he believes his system translates into excellent patient care and a first-rate patient experience. Khavkin said he sometimes gets angry when there are deviations from his expectations, but that he does not yell at the office staff. That said, he testified that people know when he is angry because he speaks to them in a very stern fashion to make sure there is a clear understanding. (Tr. 567–569)

Khavkin testified that Schneir never came to him saying he was bringing complaints about working conditions on behalf of other employees. He also said that he was not aware Schneir was ever trying to organize employees to change their working conditions, or that Schneier was authorized by employees to discuss issues with him on their behalf. Khavkin admitted, however, that Schneier spoke with him about excessive employee turnover, but Khavkin did not think there was a problem. Khavkin also admitted that Schneier spoke to him about his management style, with Schneier saying that Khavkin was too strict with employees and that he needed to take a softer approach with them. According to Khavkin, for years both he and Schneier had been telling each other that they did not like the way the other person did things. Thus, Khavkin said that Schneier's complaints did not bother him. However, what

[13] Argueta said that she also discussed her concerns directly with Khavkin, but that nothing really resulted from this conversation. (Tr. 434).

Schneier was saying things about other physicians, particularly Takagi, did concern Khavkin. Khavkin testified that he wanted to have a practice group with collegiality and professionalism amongst the physicians, and he was extremely disappointed that this was not happening. (Tr. 238–239, 242, 258–259, 569, 573–574).

8. Schneier's discharge

Schneier was terminated on November 21, 2017. On that day he received an email from Respondent containing his termination letter; Schneier was in Los Angeles on vacation at the time. Linton drafted the letter, based upon specific instructions from Khavkin, and signed it on Khavkin's behalf as Respondent's CEO. The decision to fire Schneier was made solely by Khavkin. He reviewed and approved the letter before it was emailed to Schneier. The letter reads as follows:

> We regret to inform you that your employment with Khavkin Clinic, [P]LLC (the "Clinic") has been terminated effective immediately because you have failed to meet the most basic requirements of your employment.
>
> In addition to several prior breaches of the terms of your employment, you have now failed to report any surgeries you have performed for billing during the last several weeks. Because you have not reported any surgeries for billing, the Clinic has no records indicating that you have performed any surgeries on behalf of the Clinic in the last several weeks. You have also made several derogatory and accusatory comments concerning other surgeons with the Clinic that are detrimental to the Clinic's interests. You have also failed to respond to my text messages and phone calls wherein I have attempted to address these issues with you.
>
> Because you have not performed the work required of you under the terms of your employment by not reporting any surgeries for billing for at least the last two weeks, the Clinic will not be paying you any further salary other than that already paid to you.

With this letter, Schneier's approximately 17-month employment with Respondent ended, as did his 20-year friendship with Khavkin. (Tr. 122–123, 210, 328–329, 451–452; GC. 8).

a. The runup to Schneier's discharge

According to Schneier, his relationship with Khavkin started to strain in the spring of 2017 after he met with Nutile. And, in the months leading up to his November 21 discharge, Schneier started looking for employment elsewhere. Schneier said that he expected to be fired, testifying that he was "in dialogue" with Respondent, and thought to himself "if you read this I'm about to be terminated." (Tr. 389–392).

Schneier testified that a local hospital system as well as other neurosurgical practice groups were recruiting him, and by late October he was negotiating employment terms with

another Las Vegas medical group. On October 11, 2017, Schneier had a text message exchange with one of Respondent's former employees named Catrice. Catrice texted Schneier saying, in part, that she hoped he got "out of that horrible place and on to something better soon," and said that Khavkin "is an idiot." Schneier replied "[h]is rage is pathological." During this text conversation Catrice asked Schneier when he was "getting out" and Schneier responded saying that he was working on terms with another medical group. In the weeks leading up to Schneir's termination, Khavkin learned that Schneier was looking for a new job. (Tr. 383, 390, 393, 570–71; GC. 20).

In 2017, Thanksgiving occurred on November 23. Schneier had scheduled vacation to correspond with the Thanksgiving holiday, which also coincided with his anniversary. Schneier testified that, on his last day examining patients before going on vacation, he had a conversation with Linton. Linton told Schneier that his surgical outcomes were good, that the patients and the staff liked him, and asked Schneier "how can we make this work" and "[w]hy can't we make this work." (Tr. 325) Schneier testified that he told Linton "we've been over this countless times . . . [i]t's about call money. It's about financial disclosure." (Tr. 324–327).

On Friday November 17, Schneier testified he called Linton to say his paycheck had not been deposited and asked Linton if he was being fired. Linton told Schneier that he would talk to Khavkin and find out. It is unclear whether Linton ever communicated with Schneier again before sending him the November 21 termination letter.[14] (Tr. 327)

b. Khavkin's reasons for firing Schneier

Khavkin testified that his decision to fire Schneier was based on a combination of factors including: (1) the derogatory comments made about other physicians; (2) Schneier's failure to make payments on the loan; (3) the fact he was losing money on having Schneier in the practice group; (4) Schneier's failure to report billing; and (5) a lack of trust, based on Schneier moving one of Khavkin's patients to his surgery calendar and asking the scheduler to keep it a secret. (Tr. 250–251).

According to Khavkin, although Schneier's conduct had been building up over several months, he waited until November 21 to fire him thinking that, in the right environment and with the right structure, Schneier would be able to come around. Khavkin said that anyone else would have been fired many months earlier, but he wanted to make it work because of his friendship with Schneier and the fact he was the one who brought Schneier to Las Vegas. Khavkin said that, if the reasons identified for Schneier's termination were just individual or isolated issues, he would not have fired Schneier. However, combined, Schneier's behavior ultimately reached the point that Khavkin thought "enough is enough." (Tr. 227; Tr. 151–152, 157, 177–178, 249–250).

i. Derogatory comments

Khavkin testified that various physicians had complained to him that Schneier was making derogatory comments about them and their interactions with Schneier had been unprofessional. Khavkin said many of these comments were coming from people who were his

[14] Tr. p. 324, line 16 should read "sin qua non" instead of "cynical known."

friends, and the complaints about Schneier from other physicians were multiple and cumulative. According to Khavkin, he was also concerned that Schneier was making unfavorable comments to others about both Khavkin and Takagi. This played a role in his decision to fire Schneier because he thought Schneier was portraying the Khavkin Clinic in a poor and unprofessional manner, which affected the reputation of Khavkin individually and the Khavkin Clinic in general. Therefore, he did not think that Schneier should continue being a part of his practice group. While Schneier denied making derogatory comments about other doctors, none of the physicians identified by Khavkin were called as witnesses to deny that they had complained to Khavkin about Schneier. (Tr. 125–128, 156–157, 354, 366, 368).

ii. Money issues and billing practices

Although not included in the termination letter, Khavkin testified that another reason for Schneier's termination was "the money that he borrowed from me that he refused to pay over and over and over again after multiple attempts." (Tr. 157). Khavkin said his frustration over Schneier's lack of responsiveness regarding this matter accumulated over time. Khavkin was also unhappy with Schneier because he believed Respondent was losing money on him every month. Khavkin thought that that Schneier was barely performing surgeries or seeing patients and that he was not producing sufficient revenue for the clinic. (Tr. 126–127, 137, 157).

As for Schneier's billing practices, Khavkin testified that Schneier did not submit any surgery billings in the weeks before his discharge, and this conduct had occurred previously throughout his employment. Khavkin said that Schneier's faulty billing practices, along with his lack of productivity, were the "prior breaches" referred to in Schneier's termination letter. (Tr. 126–127). Regarding the billing information, Khavkin testified that, without this information Respondent did not know what kind of surgeries were being performed and therefore could not bill for them. According to Khavkin, he had tried since September to discuss these issues with Schneier, who did not respond to Khavkin's emails, phone calls, or text messages. For his part, Schneier denied that, before his discharge, Khavkin tried to contact him about his billing practices. (Tr. 124, 129–132, 144–145, 178).

As it turns out, in the weeks before his discharge, Schneier was in fact performing surgeries, and Khavkin knew this before the termination. Schneier's surgical dictation records were introduced into evidence showing that he performed surgeries at Centennial Hills Hospital in Las Vegas on November 14, 15, and 17.[15] Khavkin testified that, the fact Schneier was actually performing surgeries in November did not change his belief that Schneier's termination was warranted because he thought that Schneier was not submitting these surgeries for billing. Moreover, Khavkin said that the issues of Schneier's billings and collections, standing alone, were not the primary reasons for his discharge.[16] (Tr. 132, 145–146, 150; GC. 5)

[15] He also examined patients at the clinic on November 13. (Tr. 333–335; GC. 6).

[16] Khavkin provided an affidavit in his civil lawsuit against Schneier, dated December 28, 2018, where he stated that Schneier was not performing any surgery at all in the several weeks before his discharge, which is clearly incorrect. (Tr. 208; GC. 5, 14) When confronted with this inconsistency, Khavkin testified that he was not aware of the surgeries at the time of the affidavit because no billing information had been submitted. (Tr. 208).

iii. Lack of trust

Khavkin testified that the final straw which was the catalyst for his decision to fire Schneier was an incident that was reported to him by Nicole Blanco (Blanco), who was the surgical scheduler/coordinator. According to Khavkin, Blanco reported to him that Schneier told her to put one of Khavkin's patients on Schneier's surgical schedule, and to hide this information along with the patient's chart from Khavkin. Khavkin believed this was the equivalent of Schneier telling Blanco to lie to Khavkin so the patient would be counted towards Schneier, even though it was Khavkin's patient. Khavkin said that this incident is what caused him to call Linton and tell him to draft the termination letter. (Tr. 178–179).

Regarding this event, Blanco testified that around the second week of October 2017, Schneier came into her office saying that he needed to schedule a patient for surgery. Blanco recognized the patient's name and told Schneier that the individual was Khavkin's patient, was already scheduled for surgery, and that a surgical chart had been created for the patient. Blanco testified that Schneier looked confused, and then started rummaging through the surgical charts. When he found the chart for the patient in question, he took the chart, put it in his briefcase, and told Blanco to "disregard. We did not have this conversation. You did not know of this patient." (Tr. 517). Blanco said Schneier then told her that he would schedule everything needed for the surgery and walked out with the chart. Blanco reported the incident to the office manager, and then to Khavkin. (Tr. 517–526).

As for Schneier, he admitted that there were several instances when, on his own accord, he provided care to people who were existing patients of either Takagi or Khavkin, or tried to do so. Schneier said he would do this if the referring physician asked him to take over the patient's care in order to fix an unsatisfactory outcome, or to smooth over a situation in order to help the patient. He also testified that, in these situations, he may have needed to hide the fact that he was taking over a patient for "political reasons" because there was a policy at the Khavkin Clinic that nobody was allowed to see any of Khavkin's patients except Khavkin. (Tr. 374–380).

B. Legal Standard

The Board applies the burden shifting analysis set forth in *Wright Line* to determine whether an employee's discharge was unlawfully motivated. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); see also, *Tortillas Don Chavas*, 361 NLRB 101 (2014) (applying *Wright Line* to 8(a)(1) allegations involving employee concerted activity); *NLRB v. Main St. Terrace Care Center*, 218 F.3d 531, 540–541 (6th Cir. 2000) (same) Under this framework, the General Counsel must prove by a preponderance of the evidence that employee protected activity was a motivating factor for the employer's actions. The elements required to support such a showing are union or other protected activity, knowledge of that activity, and animus on the part of the employer. *Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009); see also *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 8 (2019) (noting that evidence of animus must be sufficient to establish a causal relationship between the employee's protected activity and the employer's action against the employee); *NLRB v. Main St. Terrace Care Ctr.*, 218 F.3d 531, 541 (6th Cir. 2000)

("Because employers rarely admit that an employee's discharge was due to her engagement in protected concerted activity, circumstantial evidence alone may be sufficient to support a finding of unlawful motivation.").

If the General Counsel makes this initial showing, the burden of persuasion shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even if the employee had not engaged in protected activity. *Consolidated Bus Transit*, 350 NLRB at 1066; see also *Ready Mixed Concrete Co. v. NLRB*, 81 F.3d 1546, 1550 (10th Cir. 1996) (by shifting the burden the employer's justification becomes an affirmative defense). An employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity. *Rhino Northwest, LLC*, 369 NLRB No. 25, slip op. at 3 (2020) (internal quotations and citations omitted). "In other words, a respondent must show that it *would* have taken the challenged adverse action in the absence of protected activity, not just that it *could* have done so." Id. (italics in original). Where an employer's explanation is "pretextual, that determination constitutes a finding that the reasons advanced by the employer either did not exist or were not in fact relied upon." *Limestone Apparel Corp.,* 255 NLRB 722, 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). Also, where the "proffered non-discriminatory motivational explanation is false even in the absence of direct motivation the trier of fact may infer unlawful motivation." *Roadway Express*, 327 NLRB 25, 26 (1998).

C. Analysis

Section 8(a)(1) of the Act protects employees from discrimination because they engaged in concerted activities for the purpose of mutual aid or protection, "even though no union activity is involved or collective bargaining is contemplated." *NLRB v. Modern Carpet Industries, Inc.*, 611 F.2d 811, 813 (10th Cir. 1979). The Board defines concerted activity as actions engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself, including cases where individual employees seek to initiate, induce, or prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 153 (2014) (citing *Meyers Industries*, 268 NLRB 493, 497 (1984) (Meyers I), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented *Meyers Industries*, 281 NLRB 882, 887 (1986) (Meyers II), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988)). Activity is undertaken for employee "mutual aid or protection" when the "employee or employees involved are seeking to 'improve terms and conditions of employment or otherwise improve their lot as employees.'" Id. at 153 (citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978).

Here, Schneier engaged in concerted activities for the purpose of employee mutual aid or protection when he discussed with Khavkin the issues of employee turnover and the way Khavkin treated the office staff. The evidence shows that various office staff employees spoke to Schneier about excessive office turnover and their associated fear that they would be fired. Office staff, including Argueta, also complained to Schneier about how Khavkin was abusive, in that he would direct his anger at the office staff over matters they could not control. Schneier

told Argueta that he would bring up the issue regarding Khavkin's behavior.[17] As such, Schneier's discussions with Khavkin about these matters were a logical outgrowth of the complaints that he had previously discussed with the office staff, and therefore he was engaged in concerted activity for the purpose of mutual aid and protection. *Mitsubishi Hitachi Power Systems Americas, Inc.*, 366 NLRB No. 108, slip op. at 18 (2020) (engineer engaged in concerted activity for the purpose of mutual aid and protection when he raised concerns about manager's abuse of certain employees, as his concerns were a logical outgrowth of the complaints that the engineer had previously discussed with some of his coworkers); *Fivecap, Inc.*, 331 NLRB 1165, 1198 (2000), enfd. 294 F.3d 768 (6th Cir. 2002) (Employees engaged in concerted activities for mutual aid and protection by circulating petition complaining that the employer's mistreatment of workers was causing high staff turnover).

The parties vigorously dispute whether the General Counsel has met the remaining requirements for establishing a prima facie case of discrimination, with Respondent arguing there is no evidence of unlawful animus, and the Charging Party and the General Counsel pointing to what they claim are the inaccuracies in the termination notice and Respondent's shifting explanations. (Resp't Br., at 28–35; CP Br., at 3; GC. Br., at 15–20). In the end, however, I believe these arguments are academic as the preponderance of the evidence shows that Schneier provided Respondent with sufficient reasons for his termination notwithstanding his protected concerted activities which ultimately had no causal relationship with, and were unrelated to, his discharge.

According the termination letter, and Khavkin's testimony, one of the primary reasons for Schneier's discharge was the fact he was saying things about both Khavkin and Takagi to others which portrayed the clinic in a poor and unprofessional manner and adversely affected Respondent's reputation. The evidence supports a finding that Schneier was, in fact, doing so.

It was clear that Schneier did not think much of Takagi's skills as a surgeon, thought Takagi was dumping cases on him, and was upset he was performing hospital calls for Takagi but not getting the extra call money. I credit Takagi's testimony, which was also supported by Gottesman, that Schneier would make disparaging remarks about Takagi in front of others, by calling him incompetent and saying he was not a good surgeon. Schneier's comments made it back to Khavkin who rightfully believed these comments were unprofessional and negatively affected the clinic's reputation. Schneier's statements about Takagi have no relationship whatsoever to any of his protected concerted activities. And, this conduct was sufficient justification for Schneier's termination. *Kent Products, Inc.*, 289 NLRB 824, 829 (employee who made inflammatory comments about his coworker would have been fired notwithstanding his concerted activities). That Khavkin believed Schneier was also disparaging Khavkin's abilities as a doctor, and other physicians in the community reported to him that Schneier was trash-talking them around town, lends further support to Khavkin's claim that Schneier's

[17] The fact Argueta knew Schneier would bring up her complaints about Khavkin with someone from Respondent is ultimately irrelevant, as Section 7 protects Schneier's right "to act on behalf of other employees even if they have not given [him] prior permission to do so." *E.A. Renfroe & Co.*, 368 NLRB No. 147, slip op. at 18 (2019).

comments were negatively affecting the clinic's reputation in the community, and that Respondent's decision to fire Schneier was unrelated to any of his concerted complaints.[18]

Further supporting a finding that Schneier's discharge was unrelated to his concerted activities is the approximately 6-month lapse between his concerted conduct and his discharge. "[W]here a significant lapse of time occurs between the [protected concerted] activity and discharge, an inference of discrimination may not be warranted." *Salem Tube, Inc.*, 296 NLRB 142, 144 (1989). According to Schneier, he discussed with Khavkin concerns about employee turnover in November or December 2016, and the issue of Khavkin's aggressive behavior towards the office staff in about March and June 2017; Schneier also testified that he discussed Khavkin's aggression with Linton sometime "over the summer" of 2017. (Tr. 317) The fact multiple months had passed between Schneier's concerted complaints and his discharge supports a finding that his concerted actions were unrelated to his termination, particularly when, as here, there are no unlawful statements or other intervening unfair labor practices occurring in the interim. *Sys-T-Mation, Inc.*, 198 NLRB 863, 864 (1972) (No causal connection between employee's union activity and discharge where termination happened more than 6 months after the union activity began, 4 months after the representation election, and there was no affirmative evidence of antiunion animus, such as interrogations or threats). *Central Valley Meat Co.*, 364 NLRB 1078, 1079, 1092 (2006) (insufficient connection between union activity and schedule change, which occurred 6 months after the employee's union activity had ended).

The General Counsel asserts that Khavkin's testimony about Schneier's unwillingness to repay the loan, and his lack of billing, is evidence of Respondent's unlawful motive. (GC. Br. 15–17). However, rather than being evidence of some nefarious scheme, I believe the record shows that Khavkin was just stating the obvious.

Although both Schneier and Khavkin, at times, tried to downplay the importance money was to their dispute, the issue of money and how it was affecting their employment relationship was a reoccurring theme throughout the trial. "When someone says it's not about the money, it's about the money." *California Valley Miwok Tribe v. United States*, 424 F. Supp. 2d 197, 203 fn. 7 (D.D.C. 2006), aff'd, 515 F.3d 1262 (D.C. Cir. 2008) (internal quotation omitted). Before trying to walk-back the importance of the loan in his termination decision, Khavkin admitted that Schneier's failure to repay the loan was one of the two primary reasons for his discharge, the other being the derogatory statements about Takagi and other physicians. (Tr. 156–157). I also find it significant that, the week preceding his discharge, when Linton asked Schneier how Respondent and Schneier could "make this work," Schneier did not say anything about Khavkin's expressions of anger towards the office staff or about employee working conditions. Instead, he told Linton "we've been over this countless times . . . [i]t's about call money. It's about financial disclosure." (Tr. 325).

[18] Although Schneier denies disparaging other physicians, the question is not whether Schneier actually made these comments, but whether Khavkin reasonably believed that they were made. Cf. *Billups v. Methodist Hosp. of Chicago*, 922 F.2d 1300, 1304 (7th Cir.1991) (in Title VII case court's responsibility is not to determine whether alleged acts occurred, but whether the employer's belief was honestly held). Khavkin's testimony that multiple physicians complained to him about statements attributed to Schneier is unrebutted, as no party called these other doctors as witnesses to deny that they complained to Khavkin about Schneier.

Schneier was plainly dissatisfied with his $40,000 per month salary and thought he should be paid extra for performing hospital calls which he believed could double his compensation. He was also upset with the notion that that Takagi was getting the hospital-call money, while he was dumping patients on Schneier. It was clear that Schneier further believed he was excused from repaying the over $150,000 loan/frontpay he received from Respondent because he was not getting a fair opportunity to succeed at the clinic. Khavkin, in turn, was unmistakably upset that Schneier was not acknowledging or repaying the loan, and further believed that he was losing money on Schneier's employment. While the evidence showed Schneier's collections were enough to cover his $40,000 monthly salary, it is unclear if his revenues were sufficient to cover his portion of the clinic's expenses. Moreover, it was obvious that Khavkin was expecting Schneier to be billing and collecting more than he actually was, especially considering Schneier's years of experience and area of specialty. Khavkin was further frustrated at Schneier's inability to grow his practice and his refusing to perform certain surgeries on patients referred to him by Khavkin or Takagi.

Khavkin believed he was trying to help Schneier, who in turn was unappreciative. In Khavkin's mind, he bailed-out Schneier, who was having troubles in California, by facilitating his move to Las Vegas and hiring him at the Khavkin Clinic as a favor to a close friend. And, instead of gratitude, Khavkin thought Schneier was undercutting the clinic's reputation by running his mouth around town and was also refusing to repay or acknowledge a significant loan. Then, in October 2017, Khavkin learned that Schneier tried to arrange a surgery for one of his patients, took the patient's chart, and told the office staff not to say anything. And, in November he learned that Schneier was looking for work elsewhere. Khavkin had enough of his former friend. Based on the facts presented, why exactly Khavkin waited until the Thanksgiving holiday to fire Schneier is unknown. While Khavkin testified the catalyst for the discharge was the incident involving Schneier trying to take over one of Khavkin's patients, Blanco testified this incident occurred in mid-October. Whatever the reason Khavkin waited until Thanksgiving to fire Schneier, what is clear is that the evidence does not support a finding that Schneier's termination was in any way related to his complaints about excessive turnover in December 2016, his complaints about the way Khavkin treated the office staff made some 4–6 months earlier, or any other concerted complaints about working conditions. *Carolina Paper Mills, Inc.*, 254 NLRB 1071, 1077 (1981) (employee's union activities, which occurred some 3 to 6 months prior to the discharge, had no bearing on the employer's termination decision); *Sys-T-Mation, Inc.*, 198 NLRB 863, 864 (1972); *Central Valley Meat Co.*, 364 NLRB 1078, 1079, 1092 (2006). Instead, I believe that the preponderance of the evidence shows that Respondent would have fired Schneier notwithstanding any of his concerted activity. Under these circumstances, I recommend this allegation be dismissed.

IV. NONDISCLOSURE AGREEMENT

A. Facts

Respondent maintains an employee handbook that applies to the clinic's non-physician employees. The handbook contains a Nondisclosure Agreement which employees are required to sign. The agreement prohibits employees from disclosing to third parties any confidential information unless they receive approval from the president of the company, and states that the

prohibition remains binding upon employees for two years after the termination of their employment. (Tr. 85–89; GC. 3). Confidential information is defined by the agreement as follows:

> As used herein, "Confidential Information" shall mean any and all technical and non-technical information related to Yevgeniy A. Khavkin MD PC provided by either party to the other, including but limited to client(s) personal and professional information, Yevgeniy A. Khavkin MD PC trade secrets, business proprietary information—ideas, techniques, know-how, processes, software programs, and formula related to the current, future and proposed products and services of Yevgeniy A. Khavkin MD PC, and including, without limitation, their respective information concerning research, development, financial information, procurement requirements, purchasing, customer/patient lists, investors, employees, business and contractual relationships, business and contractual relationships [sic], business forecasts, sales, and merchandising, marketing plans and information the disclosing party provides regarding third parties, or anything else relating to Yevgeniy A. Khavkin MD. PC.[19]

Regarding the Nondisclosure Agreement, Khavkin initially testified that the reason for the agreement was "confidentiality related to the care of the patients." (Tr. 89) However, he then testified that he really did not know why it was included in the handbook, because it was placed there by Respondent's administrator. In fact, Khavkin said that he was not even aware the Nondisclosure Agreement was in the handbook and that the first time he had even seen it was during his testimony. He went on to testify that the attorney who helped him establish the clinic most likely gave him the handbook, said it was a standard handbook used in Nevada, and they were going to use it. No other evidence was presented explaining the justification for the Nondisclosure Agreement. (Tr. 89–91).

B. Analysis

In *Boeing Co.*, 365 NLRB No. 154 (2017), the Board established a new standard for determining whether a facially neutral work rule or policy, when reasonably interpreted, would unlawfully interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. Under *Boeing*, the Board will evaluate two things when interpreting facially neutral provisions that potentially interfere with rights protected under the Act: "(i) the nature and extent of the potential impacts on NLRA rights, and (ii) the legitimate justifications associated with the rule." Id. slip op. at 3.

The initial burden of proving that a facially neutral provision potentially interferes with the exercise of Section 7 rights, when read in context and interpreted by a reasonable employee, rests with the General Counsel. *Boeing Co.*, 365 NLRB No. 154, slip op. at 3. If the General Counsel is able to show that a reasonable employee would interpret the provision as potentially interfering with the exercise of Section 7 rights, the Board will balance the potential interference

[19] "Yevgeniy A. Khavkin, M.D., PC" was Respondent's prior name, which was subsequently changed to Khavkin Clinic, PLLC. It is the same entity, with the same tax ID number. (Tr. 88–89).

against the employer's "legitimate justifications associated with the rule." *La Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 3 (2019).

In *Boeing*, the Board established three categories of employment rules, policies, and handbook provisions. Category 1 includes those rules that are lawful, either because the rule does not prohibit the "exercise of NLRA rights," or the potential adverse impact is "outweighed by the justification associated with the rule." *Boeing Co.*, 365 NLRB No. 154, slip. op. at 3–4. Category 3 includes those rules that the Board designates as unlawful to maintain because they would prohibit or limit conduct protected under the Act, and the adverse impact on employee rights is "not outweighed by justifications associated with the rule." Id. at 4. Category 2 includes those rules that warrant individual scrutiny, on a case by case basis, to determine whether the rule prohibits or interferes with rights protected by the Act, and if so whether any adverse impact on these rights "is outweighed by legitimate justifications." Id. slip op. at 4.

Respondent's Nondisclosure Agreement defines as confidential information "any and all technical and non-technical information related to [Respondent] provided by either party to the other, including but not limited to client(s) personal and professional information, [Respondent] trade secrets, business proprietary information—ideas, techniques, know-how, processes, software programs, and formula related to the current, future and proposed products and services of [Respondent], and including, without limitation, their respective information concerning research, development, financial information . . . customer/patient lists, investors, employees, business and contractual relationships, . . . or anything else relating to [Respondent]." The agreement is binding upon employees for two years after they stop working for Respondent.

While an employer may lawfully restrict the dissemination of information obtained from its confidential records, *International Business Machines Corp.*, 265 NLRB 638, 638 (1982), employees have the right to lawfully use information that comes to their attention in the normal course of their work, including employee names, telephone numbers, and other contact information, for organizing and other protected activities. *Ridgely Mfg. Co*., 207 NLRB 193, 196–197 (1973), enfd. 510 F.2d 185 (D.C. Cir. 1975) (employee was engaged in protected, concerted activity by memorizing the names of coworkers from timecards for the purpose of contacting them about unionizing); *Gray Flooring*, 212 NLRB 668 (1974) (employer unlawfully fired worker for copying the names and telephone numbers of coworkers, which was openly available in a supervisor's office, in order to give the information to the union). And, they have the right to disclose information relating to their working conditions, including information about their wages, vacations, and other benefits, to third parties. *Allstate Insurance Co.*, 332 NLRB 759, 765 (2000) (employees engaged in concerted activities protected by the Act when they discussed their working conditions with a magazine reporter). Here, when read in context, and reasonably interpreted, Respondent's definition of confidential information is so broad that it prohibits employees from disclosing to others "anything" relating to their working conditions at the Khavkin Clinic. Therefore, a reasonable employee would read the Nondisclosure Agreement as interfering with rights protected by the Act. Cf. *McDonald's Corp.*, 200 NLRB 359, 361 (1972) (supervisor's statement, referring to no-solicitation rule, that employees would be fired if they were caught in the store "soliciting anything" was a violation of Section 8(a)(1)); *UPMC*, 366 NLRB No. 142, slip op. at 2, 19 (2018) (unwritten distribution policy banning the posting or

leaving behind of non-work materials involving "anything anywhere on Hospital property" was overly broad and a violation of Section 8(a)(1)).

Indeed, it is the breadth of Respondent's Nondisclosure Agreement that distinguishes it from the language recently found lawful by the Board in *Motor City Pawn Brokers, Inc.*, 369 NLRB No. 132 (2020). In *Motor City Pawn Brokers*, the employer maintained an employment agreement that defined confidential information as "certain written, oral, visual, and/or electronic information relating to trade secrets and proprietary interests of [the] Employer, . . . and their clients, employees, independent contractors, . . . vendors, subcontractors, business prospects, and/or referral sources which may include, but may not be limited to, records and information dealing with projects, business opportunities, intellectual property, data storage and custom design solutions, customer lists, customer information, customer matters[,] customer identities, business strategies, [and] business methods," among other information. 369 NLRB No. 132, slip. op. at 2, 17 (2020). The Board held this provision was lawful, finding that an objectively reasonable employee, reading the provision in context, would not interpret it to interfere with employee Section 7 rights. Id. slip op. at 5. In so finding, the Board noted that the various examples cited in the provision were "specific examples of obviously proprietary information" and none of the examples "would lead employees to reasonably think that matters relating to their employment were encompassed within the . . . definition of confidential and proprietary information." Id.

The definition of confidential information in *Motor City Pawn Brokers*, was restricted to "**certain** written, oral, and or visual, and/or electronic information relating to **trade secrets and propriety interests**" of the employer that are/will be made available to employees. (emphasis added). The word "certain" is a word of limitation, defined as a something that is "determined, fixed, settled." *Websters New Universal Unabridged Dictionary* 297 (2d ed. 1979).[20] Thus, by using the word "certain" the employer in *Motor City Pawn Brokers* narrowly defined confidential information, limiting it to the fixed and settled material delineated in the agreement relating specifically to the employer's trade secrets and proprietary interests.

Here, by contrast, the Nondisclosure Agreement begins and ends with broad and sweeping definitions of confidential information. The agreement starts by defining confidential information as "any and all technical and non-technical information related to" Respondent provided by either party to the other. "[T]rade secrets" and "business proprietary information," are just two examples of confidential information, and in no way limit the meaning of "all technical and non-technical information related to" Respondent. *Cooper Distributing Co., Inc. v. Amana Refrigeration, Inc.*, 63 F.3d 262, 280 (3d Cir. 1995) (where list of definitions is prefaced by the phrase "including but not limited to" the parties to a contract unambiguously state that the list is not exhaustive, and the listed definitions do not narrow the meaning of the preceding clause). And then, in case there was any doubt, the agreement ends by saying confidential information also includes "anything else relating to" Respondent.

Given the broad and sweeping definition of confidential information, it is clear that a reasonable employee would read this provision to mean exactly what it says: confidential

[20] See also *Merriam-Webster Dictionary Online*, defining the word "certain" as "fixed, settled." https://www.merriam-webster.com/dictionary/certain (last visited August 3, 2020).

information includes any and all information provided by Respondent to its employees, including all the items specifically defined in the agreement, and anything else relating to Respondent. In short, all information employees receive from Respondent is confidential, and by signing the Nondisclosure Agreement, employees have entered into a contract with Respondent prohibiting them from disclosing this information for up to two years after they stop working for the Khavkin Clinic. There is no other way to read this contract.

Therefore, if Respondent provides employees with information about their work rules, vacation, benefits, insurance, or salary, the agreement's broad and sweeping definition deems this information to be confidential and prohibits employees from disclosing it to others, a right that is protected under Section 7 of the Act. And, in case there was any ambiguity that the words "any and all" and "anything else" mean exactly what they say, that everything whatsoever related to Respondent, including employee terms and conditions of employment, are confidential, Respondent includes the word "employee" as part of its definition of what information is confidential. The standard definition of the word "employee" is "one who is hired by another, or by a business firm, etc., to work for wages or salary." *Websters New Universal Unabridged Dictionary*) 595 (2d ed. 1979).[21] The payment of "wages or salary" for work is the basis for the definition of the word "employee." A reasonable worker, laboring away every day for wages, clearly understands this meaning when reading the word "employee," and would understand that the Nondisclosure Agreement they signed in order to work for Respondent deems this information to be confidential. Under these circumstances, where Respondent has a broad and expansive definition of confidential information to include "any and all" information that Respondent provides to employees, including information related to "employees," and "anything else relating to" Respondent, a reasonable employee would interpret this provision as potentially interfering with the exercise of their Section 7 rights. Accordingly, under *Boeing*, this provision requires "individual scrutiny" to determine whether the adverse impact on employee Section 7 rights is "outweighed by legitimate justifications." *Boeing Co.*, 365 NLRB No. 154, slip op. at 4.

In its brief, Respondent posits various justifications for this provision, including that it is designed to protect the operating and financial future of the clinic, that it protects the release of client and employee personally identifiable information, that it guarantees the clinic complies with HIPPA, and it ensures the maintenance of privacy and professional standards in the workplace. (R. Br. at 41–43). "However, argument by brief is not evidence." *Rossin v. Southern Union Gas Co.*, 472 F.2d 707, 712 (10th Cir. 1973). And reasoned decision making must be based on admissible evidence instead of speculation. Cf. *Circus Circus Casinos, Inc. v. NLRB*, 961 F.3d 469, 486 (D.C. Cir. 2020) (improper for Board to make decision based on "speculation without a jot of evidentiary support in the record.") (internal quotation omitted).

Here, the only evidence in the record presented as a justification for the Nondisclosure Agreement was the testimony of Khavkin who originally testified that the purpose of the agreement was "confidentiality related to the care for the patients." (Tr. 89) However, Khavkin then testified that he could not answer why the Nondisclosure Agreement was in the handbook,

[21] See also *Merriam-Webster Dictionary Online*, defining the word "employee" as "one employed by another usually for wages or salary and in a position below the executive level." https://www.merriam-webster.com/dictionary/employee (last visited August 3, 2020).

as it was put there by his administrator. (Tr. 90). Indeed, he went on to testify that the he had no input whatsoever into the Nondisclosure Agreement, the first time he actually saw it was at the hearing while he was on the witness stand, that he did not even know it was in the handbook, and "[m]ost likely what happened" was that the attorney who helped him open the clinic "said this is a standard handbook that's used in Nevada and that's what we're going to use." (Tr. 91).

It is clear that, based on this testimony, Khavkin had no personal knowledge as to why the Nondisclosure Agreement was included in the employee handbook, the nature of the agreement, or the justifications behind it. Fed. R. Evid. 602 ("A witness must testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."). While Khavkin identified two individuals who would have known the justifications for the Nondisclosure Agreement, Respondent's administrator and the attorney responsible for the handbook, those individuals were not called to testify. And, no other admissible evidence was presented as a justification for the agreement. Accordingly, I find that, under these circumstances, Respondent has not presented a legitimate justification for the broad and sweeping prohibitions in the Nondisclosure Agreement, and the agreement violates Section 8(a)(1) of the Act.[22]

The same conclusion is warranted even if Khavkin's testimony regarding the justification for the Nondisclosure Agreement, that it is related to confidentiality involving patient care, is considered. The protection of confidential patient and patient care information is covered elsewhere in the handbook. (GC. 4, p. 9.) And, while the Nondisclosure Agreement specifically states that it also applies to "client(s) personal and professional information," Respondent presents no legitimate justification as to why information regarding its employees, all technical or non-technical information, or anything else relating to the Khavkin Clinic cannot be disclosed to third parties, or how these additional prohibitions in the Nondisclosure Agreement relate to patients or patient care. Under these circumstances, requiring workers to keep confidential all information they receive from Respondent, including information regarding employees or anything else relating to the Khavkin Clinic, does not further any legitimate interest in protecting patient care information, and adversely impacts employee Section 7 rights. Cf. *Fox v. Services, Supports and Solutions, Inc.*, 6:17–cv–1130, 2018 WL 7361008, at *2 (M.D. Fla. Dec. 12, 2018) (order denying approval of proposed FLSA settlement where confidentiality agreement prohibited plaintiffs from not only discussing the terms of the agreement, but also precluded them from discussing "the operations of defendant, or anything else regarding defendant," as the provision "appears to serve no purpose other than to discourage further FLSA lawsuits.").

[22] Unlike the confidentiality provision the Board found lawful in *Interstate Management Co., LLC*, here there is no preamble to the agreement emphasizing "that the restriction on disclosure only pertain[ed] to information that Respondent keeps" or a reminder that employees are responsible "for protecting *the Company's* confidential information and information systems from unauthorized internal and external access." 369 NLRB No. 84, slip op. at 4 (2020) (italics in the original). Also, unlike the circumstances here, in *Interstate Management Co., LLC*, Respondent's vice president of compliance, who helped draft the provision in question, testified as to its legitimate justification. Id. at slip op. 8–9.

CONCLUSIONS OF LAW

1. The Respondent is a healthcare institution within the meaning of Section 2(14) of the Act and an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act by maintaining an overly broad and discriminatory Nondisclosure Agreement requiring employees to keep confidential all information or anything else relating to Respondent, including information regarding employees.

3. The Respondent did not violate the Act as further alleged in the Complaint.

REMEDY

Having found Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act. The Respondent shall be required to post the attached notice in accordance with *J. Picini Flooring*, 356 NLRB 11 (2010).

Also, immediate rescission of the offending rules is the standard affirmative remedy for the maintenance of unlawful work rules, as it guarantees workers can engage in protected activity without the fear of being subjected to the unlawful rules. *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151, 159 (2014) (citing *Guardsmark, LLC,* 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007). Accordingly, Respondent shall supply employees with inserts for its Employee Handbook stating that the unlawful Nondisclosure Agreement has been rescinded, or with a new and lawfully worded Nondisclosure Agreement on adhesive backing that will cover the unlawfully version, until it republishes the Employee Handbook either without the unlawful provisions or with lawfully-worded rules. Id. Any copies of the Employee Handbook that are printed with the unlawful Nondisclosure Agreement must include the inserts before being distributed to employees. Id.

Also, Respondent shall notify all current employees (and former employees withing the past 2 years) who were required to sign the Nondisclosure Agreement, or who received the Employee Handbook, informing them that the Nondisclosure Agreement has been rescinded or revised and provide them with a copy of the revised agreement. *GC Services Limited Partnership*, 369 NLRB No. 133, slip op. at 10 (2020).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[23]

[23] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

Respondent Khavkin Clinic, PLLC, its officers, agents, successors, and assigns, shall:

1. Cease and desist from

(a) Maintaining rules, including in its Employee Handbook, in its Nondisclosure Agreement, or anywhere else, requiring employees to keep confidential all information or anything else relating to Respondent, including information regarding employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Rescind the Nondisclosure Agreement in all forms, including in the Employee Handbook, or revise it in all forms, to make clear to employees that they are not required to keep confidential all information or anything else relating to Respondent, including information regarding employees.

(b) Notify all current employees (and former employees withing the past 2 years) who were required to sign, or otherwise became bound by, the Nondisclosure Agreement, that the Nondisclosure Agreement has been rescinded and, if revised, provide them with a copy of the revised agreement.

(c) Post at its Las Vegas, Nevada facility and all other facilities were the Nondisclosure Agreement has been maintained copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted.[24] In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed any of the facilities involved in these proceedings, the Respondent shall

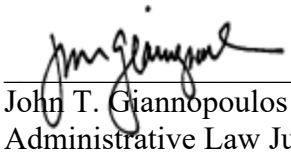
[24] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means, and to the reading of the notice to employees. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the closed facilities any time since November 11, 2017.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply with this order.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. August 6, 2020



John T. Giannopoulos
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose a representative to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT maintain a Confidentiality/Nondisclosure Agreement (Nondisclosure Agreement), Employee Handbook provision, or rule, requiring you to keep confidential all information or anything else related to the Khavkin Clinic, including information regarding employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind our Nondisclosure Agreement and Employee Handbook by removing any provision that requires you to keep confidential all information or anything else related to the Khavkin Clinic, including information regarding employees.

WE WILL furnish you with inserts to our Employee Handbook that (1) advise you that the unlawful rules in the Nondisclosure Agreement have been rescinded, or (2) provide a lawfully-worded Nondisclosure Agreement on adhesive backing that will cover the unlawful version; or **WE WILL** publish and distribute to all current employees, a revised Employee Handbook that (1) does not contain the unlawful language in the Nondisclosure Agreement, or (2) provides a lawfully-worded Nondisclosure Agreement.

WE WILL notify all current employees (and former employees within the past two years) that the Nondisclosure Agreement has been rescinded and, if revised, provide them with a copy of the revised agreement.

Khavkin Clinic PLLC
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

300 Las Vegas Boulevard South, Las Vegas, NV 89101
(702) 388–6416, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-220023 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (602) 416-4755.